

1 **WAGANAKISING ODAWAK STATUTE**
2 **PROTECTION OF INDIVIDUAL’S RIGHTS IN CRIMINAL PROCEEDINGS**
3 **STATUTE**
4
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6 **SECTION I. SHORT TITLE**
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8 This Statute may be cited as the “Criminal Protection Statute,” and it repeals and replaces
9 Criminal Code, WOS 1997014; WOTCL 9.101 and Checking, Draft or Order for Payment of
10 Money, WOS 2004-05; WOTCL 9.401
11
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13 **SECTION II. PURPOSE**
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15 The purpose of this Statute is to set forth protections for an individual’s rights in criminal
16 proceedings in accordance with the Little Traverse Bay Bands of Odawa Indians Constitution.
17

18 **SECTION III. DEFINITIONS**
19

20 **A.** “Adult” means any person over eighteen (18) years of age for purposes of criminal
21 jurisdiction.
22

23 **B.** “Arrest” occurs when a reasonable person would believe that he or she is not free to leave
24 and the detainment is not brief.
25

26 **C.** “Charges” means the complaint filed by the Prosecutor.
27

28 **D.** “Convicted” means that the offender has been subject to penal consequences based on the
29 conviction, however the conviction was styled. This applies to adult offenders and juveniles who
30 are prosecuted as adults.
31

32 **E.** “Imprisonment” means incarceration pursuant to a conviction, regardless of the nature of
33 the institution in which the offender serves the sentence. This term must be interpreted broadly to
34 include, for example, confinement is a state “prison” as well as in a local or Tribal “jail.”

- 1
- 2 **F.** “Indian” means a person who is a citizen of a federally recognized Indian Tribe.
- 3
- 4 **G.** “Indian Tribe” means any federally recognized Tribe.
- 5
- 6 **H.** “Minor” or “Juvenile” means an individual who has not attained the age of eighteen (18)
- 7 years.
- 8
- 9 **I.** “Non-Indian” means any person who is not a citizen of a federally recognized Indian
- 10 Tribe.
- 11
- 12 **J.** “Territorial jurisdiction of the Little Traverse Bay Bands of Odawa Indians” means
- 13 “areas referenced in Public Law 103-324, 25 U.S.C. Section 1300k-2(b)(2)(A) as the boundaries
- 14 *of the reservations for the Little Traverse Bay Bands as set out in Article I, paragraphs ‘third*
- 15 *and fourth’ of the Treaty of 1855, 11 Stat. 621.” Little Traverse Bay Bands Constitution, Article*
- 16 *V(A)(1)(a).*
- 17
- 18 **K.** “Tribal Court” means the Little Traverse Bay Bands of Odawa Indians Tribal Court.
- 19
- 20 **L.** “Tribal Citizen” means a person who is an enrolled citizen of the Little Traverse Bay
- 21 Bands of Odawa Indians.
- 22
- 23 **M.** “Tribe” means the Little Traverse Bay Bands of Odawa Indians or LTBB.
- 24
- 25 **N.** “Writ of habeas corpus” means a petition that is used to bring a prisoner or other detainee
- 26 before the court to determine if the person's imprisonment or detention is lawful.
- 27
- 28

29 **SECTION IV. CRIMINAL JURISDICTION**

30

- 31 **A.** Criminal jurisdiction of the Tribe extends to adult LTBB citizens and adult citizens of
- 32 Federally Recognized Tribes, however, upon motion of the Tribal Prosecutor the Judge has the
- 33 discretion to try a minor as an adult within the jurisdictions of Violence Against Women
- 34 Reauthorization Act of 2013 (VAWA).

1
2 **B.** The Violence Against Women Reauthorization Act of 2013 (VAWA), S.47, 113th
3 Congress, 2013-2015, was reauthorized and amended by Congress in 2013 affirming the tribes'
4 inherent power to exercise "special domestic violence criminal jurisdiction" (SDVCJ) over all
5 persons, regardless of their Indian or non-Indian status. Under VAWA LTBB has limited
6 criminal jurisdiction over non-Indian defendants only for the following crimes: dating violence,
7 domestic violence, violations of protection orders, and other crimes when committed in the
8 context of a dating or domestic relationship. The limited jurisdiction applies where a person is an
9 Indian, a person lives or works in the territorial jurisdiction of LTBB, or a person's spouse,
10 intimate partner, or dating partner is an Indian. Such special jurisdiction may only be exercised
11 when a person is charged with one (1) of the crimes in the Domestic Violence Statute and may
12 be imprisoned up to three (3) years, a fine of up to \$15,000.00, in accordance with Tribal Law
13 and Order Act (TLOA), PL 111-211, Jurisdiction.
14

15 **C.** The Indian Civil Rights Act (ICRA), 25 U.S.C. Section 1302, was enacted by Congress
16 in 1968. The Tribe's jurisdiction is limited to punishments that may impose up to a one (1) year
17 jail term and a fine up to \$5,000.00.
18

19 **D.** TLOA, PL 111-211, was enacted by Congress in 2013. The Tribe's jurisdiction is
20 extended to punishments that may impose up to three (3) years imprisonment and a fine up to
21 \$15,000.00, up the enactment of a Tribal Council Resolution.
22
23

24 **SECTION V. REQUIREMENTS FOR SEARCHES AND SEIZURES**

25

26 **A.** The Little Traverse Bay Bands of Odawa Indians Constitution states:
27

28 *"Little Traverse Bay Bands of Odawa Indians, in exercising powers of self-*
29 *governance, shall NOT: Violate the right of the people to be secure in their*
30 *persons, houses, papers, and effects against unreasonable search and seizures, or*
31 *issue warrants, unless based upon probable cause, and supported by oath or*
32 *affirmation, and particularly describing the place to be searched and the person or*
33 *thing to be seized;"*
34

1 **B.** A search warrant may be issued by the Tribal Court authorizing law enforcement to
2 search a specified place for evidence even without the occupant's consent, provided the
3 following requirements are met:
4

5 **1.** By oath, or affirmation, law enforcement shall show that probable cause that a
6 crime has been or is being committed exists and believe a search is justified when, under
7 the totality of the circumstances, a reasonable person would conclude that evidence of a
8 crime will be found where law enforcement want to search.
9

10 **2.** Any search warrant issued must contain sufficient information that particularly
11 describes the place to be searched and describe the items to be seized in such a way that
12 limits the legitimate scope of the search both spatially and temporally.
13

14 **C.** After executing a search warrant, law enforcement shall provide to the person that was
15 searched a receipt for any seized property.
16

17 **D.** If the officer has probable cause that the suspect is presently armed and dangerous, the
18 officer may conduct a limited search of the suspect's outer clothing for the limited purpose of
19 looking for weapons.
20

21 **SECTION VI. ARRESTS**

22 **A.** Immediately upon arrest, whether or not the Officer is going to question the person
23 arrested, the officer shall explain to the person under arrest the following:
24

25 **1.** You have the right to a speedy and public trial.
26

27 **2.** You are being arrested for the crime of _____ (nature and
28 cause of the accusation)
29

30 **3.** You have the right to have witnesses testify in his/her favor.
31

32 **4.** You have the right to an attorney, at his or her own expense unless
33
34

1 otherwise funded.

2
3 **B. Arrest Exception.** Law enforcement for the purpose of conducting an investigation may
4 briefly and temporarily detain a person, when the officer has a probable cause based on evidence
5 that a crime is afoot. A brief detainment is a short duration of time in both scope and nature.
6

7
8 **SECTION VII. CHARGES, ARRAIGNMENT and SENTENCING**
9

10 **A.** Only a prosecutor may bring forth charges for crimes. Charges must contain sufficient
11 information for the person being accused to ascertain the facts being alleged, the nature of the
12 charge and the approximate date and time of the commission of the offense.
13

14 **B.** Charges must be filed with the Tribal Court within seventy-two (72) hours if a person is
15 being held in law enforcement custody.
16

17 **C.** An arraignment must be conducted in open court, upon the appearance of the accused in
18 response to a summons or citation or, if the accused was arrested and confined, within seventy-
19 two (72) hours.
20

21
22 **SECTION VIII. DUE PROCESS GUARANTEES**
23

24 **A. Rights of the Accused.** In all criminal prosecutions, the Tribe shall NOT:
25

- 26 1. Subject any person for the same offense to be twice put in jeopardy;
27
28 2. Compel any person in any criminal case to be a witness against him/herself;
29
30 3. Deny any person in a criminal proceeding the right to a speedy and public
31 trial, to be informed of the nature and cause of the accusation, to be confronted
32 with the witnesses against her/him, to have compulsory process for obtaining
33 witnesses in his/her favor, and the right to an attorney, at his or her own expense
34 unless otherwise funded, and to have these rights explained at the time of arrest;

1
2 **4.** Require excessive bail, impose excessive fines, or inflict cruel and unusual
3 punishments;

4
5 **5.** Deny to any person within its jurisdiction the equal protection of its laws or
6 deprive any person of liberty or property without due process of law;

7
8 **6.** Pass any bill of attainder or ex post facto law; or

9
10 **7.** Deny to any person accused of an offense punishable by imprisonment the right,
11 upon request, to a trial by jury of not less than six (6) persons.

12
13 **B. Rights of the Accused.** In all criminal prosecutions, the accused has the following rights:

14
15 **1.** To be notified of the right to file a petition for a writ of *habeas corpus* in a court
16 of the United States.

17
18 **2.** That LTBB's criminal laws, rules of evidence, and rules of criminal procedure are
19 publicly available prior to charging the defendant.

20
21 **3.** Court-appointed attorneys.

22
23 **a.** All court-appointed attorneys must be admitted to practice law before
24 Tribal Court and must be in good standing.

25
26 **b.** All court-appointed attorneys must keep a record of all services rendered
27 by the attorney in that capacity and file the report with the Tribal Council.

28
29 **c.** By December 1 of each year, the Chief Judge shall submit to Tribal
30 Council an annual report on the average cost of defending offenses under this
31 Statute. The Judiciary may adopt a court rule that modifies the appointment of
32 court-appointed attorneys based on standards for indigent defendants.
33

1 **d.** The defendant has the right to private counsel at their own expense, at any
2 time during a criminal proceeding.

3
4 **C. Courts of Record.**

5
6 **1.** Tribal Courts are the Courts of Record and the Clerk must certify under seal as to
7 the accuracy and validity of the files and records of all proceedings before the LTBB
8 Courts.

9
10 **2.** The Clerk shall take, preserve and certify under seal to the accuracy of a verbatim
11 record of the proceedings before the Courts. The record may be created and recorded by a
12 stenographic, electronic, mechanical, or other recording devices approved by the Chief
13 Judge of the Court as a trustworthy means of creating a permanent verbatim record of all
14 proceedings.

15
16 **3.** The Chief Judge shall proscribe the length of time verbatim transcripts must be
17 preserved by the Clerk, unless otherwise addressed by Statute.

18
19 **4.** It is a criminal offense, punishable by penalties and under the laws of LTBB for
20 the Clerk of the Tribal Courts to knowingly make or keep a false file, record or certificate
21 or to alter, amend or destroy any file, record or transcript without lawful authority.

22
23
24 **SECTION IX. JUDGE AND JURY REQUIREMENTS**

25
26 **A. Tribal Court Judges.** All judges presiding over cases in which criminal jurisdiction is
27 asserted, must have sufficient legal training to preside over criminal trials.

28
29 **B. Formation of Jury.** Where the defendant is charged with a crime, the defendant has a
30 right to be tried by a jury selected from a jury pool. (For Domestic Violence cases, see WOS
31 2015-018).

32
33
34 **SECTION X. IMPRISONMENT, REHABILITATIVE, BAIL AND WEAPONS**

- 1
- 2 **A. Imprisonment.** Any defendant sentenced to greater than one-year imprisonment, must
- 3 serve the sentence in a federal or state facility; or a tribal facility that meets the standards of the
- 4 Bureau of Indian Affairs.
- 5
- 6 **B.** The Tribal Court shall consider the least restrictive and most restorative remedial
- 7 measures of imprisonment, probation or parole.
- 8
- 9 **C.** The Court shall define what facts and circumstances were taken into consideration if
- 10 restorative remedial measures of imprisonment, probation or parole were denied.
- 11
- 12 **D. Forfeiture of Weapons.** The Tribal Court may order forfeiture for all firearms and
- 13 ammunition if it is proven that a firearm was used in the commission of a crime that the person is
- 14 being sentenced.
- 15
- 16 **E.** The Court shall not require excessive bail, impose excessive fines, or inflict cruel and
- 17 unusual punishments.
- 18
- 19 **F.** The Defendant has the right to request bail to obtain release from law enforcement
- 20 custody, including the use of cash bond, surety bond, personal recognizance or release on a
- 21 citation.
- 22
- 23

24 **SECTION XI. REQUIREMENTS FOR CONVICTION**

25

- 26 **A. Culpability.** A person is not guilty of an offense unless that person acted intentionally,
- 27 maliciously, knowingly, recklessly or negligently as the law requires with respect to each
- 28 material element of the offense. However, any material element of an offense that does not
- 29 require a mental state may be established by proving that the person participated in the
- 30 prohibited conduct regardless of that person's state of mind.
- 31
- 32 **B. Burden of Proof.** No person may be convicted of an offense unless the Tribe proves each
- 33 element of the offense beyond a reasonable doubt. Reasonable doubt is not a mere possible

doubt, a speculative, imaginary or forced doubt. If each element is not proven beyond a reasonable doubt, the Tribe has not met its burden of proof.

C. Intoxication. Intoxication is not a defense unless it negates an element of the offense. Self-induced intoxication cannot negate the element of recklessness or negligence.

D. Statute of Limitations. No person may be prosecuted, tried, or punished for any criminal offense unless the prosecution is initiated within one (1) year after all of the following conditions are met:

1. Discovery that an offense has been committed; and
2. Discovery of the identity of the person who allegedly committed the offense.
3. The Tribal Court may suspend the time limitation for the amount of time that a person no longer within the Tribe's jurisdiction.

E. Statute of Limitations does not apply to charges of Criminal Homicide, and/or other crimes that have specific Statute of Limitations.

F. Multiple Counts. When the conduct of a defendant establishes the commission of more than one offense, a person may be prosecuted for each offense, unless:

1. One offense consists only of an attempt to commit the other;
2. Inconsistent findings of fact are required to establish commission of the offenses;
or
3. The offenses differ only in that one prohibits a designated kind of conduct generally, and the other prohibits a specific instance of such conduct.

SECTION XII. AFFIRMATIVE DEFENSES AND ALIBI

1 **A. Duress.** Duress is an affirmative defense that a person was coerced against his or her will
2 by the use of, or threatened use of, unlawful force against a person's person or the person of
3 another. The coercion must be such that a person of reasonable firmness would be unable to
4 resist.

5
6 **B. Protection of Self, Property, or Another Person.** The use of reasonable force toward
7 another person is justified and is an affirmative defense if the following requirements are met:

8
9 **1.** The force is directed toward someone who is using unlawful force; and

10
11 **2.** The person using such force reasonably believes the use of force is necessary for
12 his or her protection or that of a third person.

13
14 **C. Alibi.** The defense of alibi is used when the accused was somewhere else when the crime
15 was committed and must be treated procedurally as an affirmative defense.

16
17 **D. Mental Infirmary, Disease, or Defect.** Mental infirmity, disease, or defect is an
18 affirmative defense that because of a condition a person did not know what he or she was doing
19 or the consequences of those actions or although a person knew what he or she was, but did not
20 know it was wrong.

21
22 **E. Lawful Possession of a Controlled Substance.** Lawful possession of a controlled
23 substance is an affirmative defense when the substance was lawfully obtained from a practitioner
24 or pursuant to a valid prescription or order of a practitioner while acting in the course of the
25 practitioner's professional practice.

26
27 **F. Entrapment.** Entrapment is an affirmative defense if a person:

28
29 **1.** Was induced or encouraged to engage in the conduct of the crime charged for
30 purposes of obtaining evidence of the commission of a crime;

31
32 **2.** Engaged in conduct as a direct result of the inducement or encouragement;
33

1 **3.** The person who induced or encouraged a person was a law enforcement officer or
2 a person acting as an agent of a law enforcement office;

3
4 **4.** The person who induced or encouraged a person used methods of persuasion or
5 inducement that created a substantial risk that the crime would be committed by a person
6 other than one who was ready to commit it; and

7
8 **5.** Was not a person who was ready to commit the crime.
9

10 **G. Self-Defense.** Self-defense is an affirmative defense if the death or injury to a person
11 resulted from the justifiable use of deadly force where a person reasonably believed that the
12 force was necessary to prevent imminent death or great bodily harm to him or herself.
13

14 **H. Procedures for Raising an Affirmative Defense.** The procedures for raising and
15 pleading affirmative defenses are specified by LTBB Court Rule.
16

17 **I. Burden of Proof Required for an Affirmative Defense.** Affirmative defenses are
18 proven under the preponderance of evidence standard. This means that the fact finder must be
19 persuaded that each element of the affirmative defense was more probable than not. Once the
20 burden is met, the burden shifts to the Tribe to disprove the affirmative defense beyond a
21 reasonable doubt.
22
23

24 **SECTION XIII. SEVERABILITY**

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26 If any section, subsection, paragraph, sentence, phrase or portion of this Statute is, for
27 any reason, held invalid or unconstitutional by any court of competent jurisdiction, such portion
28 shall be deemed a separate, distinct and independent provision and such holding shall not affect
29 the validity of the remaining portions thereof.
30

31 32 **SECTION XIV. EFFECTIVE DATE**

1 Effective upon signature of the Executive or 30 days from Tribal Council approval
2 whichever comes first or if the Executive vetoes the legislation, then upon Tribal Council
3 override of the veto.
4
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6 **SECTION XV. OTHER RELATED STATUTES**

7
8 See Crimes, Sex Offense, Sex Offender Registration and Notification Statute, Felony Defined
9 Statute, Domestic Violence Statute, Victim's Rights Statute, Personal Protection Orders and No
10 Contact Orders and Violations of Protective Orders, Medical Marijuana Patient Protection, or as
11 may be amended.
12
13
14

CERTIFICATION